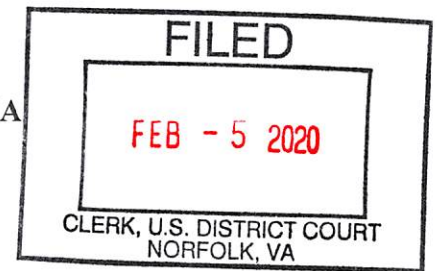


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



FRANKIE M. MILLER, JR. (#1070339),

Petitioner,

v.

ACTION NO. 2:19cv595

HAROLD W. CLARKE,
Director, V.D.O.C.

Respondent.

DISMISSAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254 filed by pro se Petitioner Frankie M. Miller, Jr. ("Miller" or "Petitioner"). Miller's petition challenges his 2003 convictions and sentences from the Henrico County Circuit Court for capital murder and aggravated malicious wounding. This is Miller's second federal post-conviction challenge to the Henrico County convictions.

Because Miller's current petition appears to challenge the same convictions and sentences that he previously challenged in Civil Action No. 2:16cv645, which was also filed in this court, his current petition falls under the successive petition provisions of the federal habeas statute.

"[B]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

28 U.S.C. § 2244(b)(3)(A).

This court has not received an order from the Court of Appeals for the Fourth Circuit authorizing the consideration of petitioner's successive application for a writ of habeas corpus. In fact, the Fourth Circuit denied Miller's request to file a successive petition by Order entered

October 21, 2019. Therefore, this court is precluded from considering Petitioner's application for a writ of habeas corpus.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Rule 72(b) of the Federal Rules of Civil Procedure. On December 18, 2019, the Magistrate Judge prepared a Report and Recommendation for Dismissal, recommending that Miller's petition be dismissed as a successive.¹ (ECF No. 7, 12). Miller was advised of his right to file objections to the Report and Recommendation. The court has received no objections and the time for filing them has now expired.

Accordingly, the court does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed December 18, 2019. It is, therefore, ORDERED that Miller's petition (ECF No. 1) be DENIED and DISMISSED without prejudice to his right to present his claims at a later date, should he obtain authorization to do so from the Fourth Circuit.

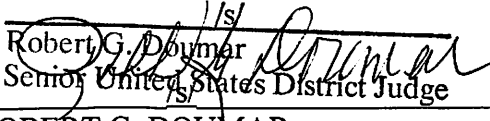
Finding that the basis for dismissal of Petitioner's § 2254 petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); see Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 335–38 (2003); Slack v. McDaniel, 529 U.S. 473, 483–85 (2000).

Petitioner is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). **If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so within thirty**

¹Miller's copy of the Report and Recommendation was returned to the court as undeliverable due to an incorrect prisoner number. A second copy of the Report and Recommendation was resent to Miller with the corrected prisoner number.

(30) days from the date of this Order. Petitioner may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is DIRECTED to mail a copy of this Dismissal Order to Petitioner at the address on file with the court. A copy of the Dismissal Order shall also be served on the Respondent and the Attorney General by CM/ECF pursuant to their Agreement on Acceptance of Service with the Court.



Robert G. Doumar
Senior United States District Judge

ROBERT G. DOUMAR
UNITED STATES DISTRICT JUDGE

Feb. 5, 2020, 2020